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No. 09-1334

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHASE MANHATTAN BANK, USA, N.A.,

Petitioner,

vs.

HAROLD S. TAXEL, Chapter 7 Trustee,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ADDITIONAL REASONS TO GRANT THE WRIT

1. The Existing Case Law Shows Why This Case Presents An Important And Unique Federal Question Requiring Review.

Respondent Harold S. Taxel, Chapter 7 Trustee ("Taxel"), claims, without referring to any particular language in the case, that the holding in ***Briggs v. Kent (In re Professional Investment Properties of America)***, 955 F.2d 623, cert. denied, 506 U.S. 818, rehearing denied 506 U.S. 1015 (9th Cir. 1992) that a debtor's bankruptcy petition could provide inquiry or constructive notice under applicable state law of an unrecorded interest in a debtor's real property, was limited to involuntary petitions. The case did involve notice gained from an involuntary petition, but no language in the case (or later cases, other than the decisions by the Bankruptcy Appellate Panel "BAP" and the Ninth Circuit Court of Appeals in the present case) limited the holding to involuntary petitions, as opposed to voluntary bankruptcy petitions.

Professional Investment first determined that a bankruptcy petition is part of the public record and a hypothetical purchaser of real property, like a bankruptcy trustee, has notice of – "a diligent title search would disclose the bankruptcy filing" and "a reasonably prudent purchaser of debtor's property would be placed on notice of the contents of bankruptcy pleadings from the time of their being filed." ***Id.*** at 627. The court then held that inquiry or constructive notice of an interest in a debtor's real property attained by a bankruptcy trustee simultaneous with the

filing of the petition was sufficient to defeat a trustee's hypothetical bona fide purchaser status under 11 U.S.C. § 544(a)(3). The specific language was, "there is no practical reason why a trustee should not be put on inquiry notice by the very petition that created his position." ***Id.*** at 628.

Thus, the holding in ***Professional Investment*** was not limited to involuntary petitions, but held that a trustee could be charged with inquiry or constructive notice of an interest in debtor's real property under applicable state law if such notice came simultaneously with the bankruptcy filing, such as, from a bankruptcy petition. Later case law, except for the appellate decisions in the present case, have followed this principle.

Taxel claims no published decision has determined that inquiry or constructive notice sufficient to defeat the section 544(a)(3) bona fide purchaser status of a trustee could be imparted by a debtor's concurrently filed schedules in a voluntary chapter 7 case. Not so.

Decker v. J. Cyril Johnson Corporation Profit Sharing Plan (In re Harvey), 222 B.R. 888 (9th Cir. BAP 1998), relied on ***Professional Investment*** and involved whether a debtor's concurrently filed schedules with a chapter 7 petition could impart inquiry or constructive notice of an unrecorded interest in a debtor's real property under California Civil Code § 19. ***Harvey*** at 893. The BAP determined, under California law, that inquiry notice of an

unrecorded interest in a debtor's real property could be provided to the trustee by a debtor's concurrently filed schedules. ***Id.*** at 893, 895, 896. The court found that the schedules did not actually provide notice of an interest in real property, but only of an interest in the sales proceeds from the property. ***Id.*** at 895, 896.

Joseph v. Hewitt (In re Castro), 15 B.R. 180 (Bnkr. C.D. Cal. 1993), like ***Harvey***, relied on ***Professional Investment***. It too applied California Civil Code § 19 to the issue of inquiry or constructive notice of an unrecorded interest in real property. The bankruptcy court held that information contained in a debtor's schedules that were not concurrently filed with a petition came too late to provide the trustee with inquiry or constructive notice simultaneous with the petition. ***Castro*** at 183; see also ***Huber v. Danning (In re Thomas)***, 147 B.R. 526 (9th Cir. BAP 1992) and ***Little v. Duncombe (In re Duncombe)***, 143 B.R. 243 (Bnkr. C.D. Cal. 1992) (two cases that relied on ***Professional Investment*** in determining if a bankruptcy trustee was put on inquiry or constructive notice of an interest in a debtor's real property simultaneous with the bankruptcy filing.)

One published bankruptcy court decision has disagreed with ***Professional Investment's*** holdings, ***Kohut v. Quicken Loans, Inc. (In re Wohlfeil)***, 322 B.R. 302 (Bnkr. E.D. Mich. 2005). This case applied Michigan law to the issue of inquiry notice of an unrecorded deed of trust sufficient to defeat a trustee's bona fide purchaser status under section 544(a)(3), which law is identical to California law. See ***Wohlfeil***

at 305. The bankruptcy court criticized the ***Professional Investment*** holding that a trustee's bona fide purchaser status under section 544(a)(3) can be defeated by the contents of a bankruptcy petition. The court stated that this status cannot be undone by information in a debtor's voluntary petition (or as the creditor claimed in ***Wohlfeil***, from information contained in concurrently filed schedules). ***Id.*** at 305, 306.

There are no conflicting appellate decisions from different circuits about whether a bankruptcy petition, as well as concurrently filed schedules, can, simultaneously with a bankruptcy filing, provide a trustee with inquiry or constructive notice of an interest in a debtor's real property under applicable state law. However, the published appellate and bankruptcy cases out of the Ninth Circuit, ***Professional Investment*** and those cases that relied on its holding, and the decisions in this case, are in conflict over the scope of the holding in ***Professional Investment*** and whether concurrently filed schedules can provide inquiry or constructive notice to a trustee simultaneously with a bankruptcy filing of an interest in a debtor's real property.

The holding in ***Professional Investment***, that inquiry notice simultaneous with the bankruptcy filing is sufficient to defeat the trustee's bona fide purchaser status, means that schedules filed at the same instant as the petition can provide such notice. ***Harvey*** agreed with this principle, as did the analysis and holding in ***Castro***. The decisions in the

present case have said no to this simple, practical approach to defining a trustee's strong-arm powers under section 544 (a)(3).

Whether a debtor's electronically filed schedules, filed at the same instant as a voluntary petition and noted on the court's docket as a single filing, can provide inquiry or constructive notice of an interest in a debtor's real property sufficient to defeat a trustee's strong-arm powers under section 544(a)(3), presents a unique issue, and a timely one, considering today's economy and the universal use of instant electronic transmission of the written word to conduct business. Couple this with the conflicting decisions out of the Ninth Circuit, the fact that the trustee's strong-arm powers are, undoubtedly, an important federal question, and the fact this court has yet to decide the issue, and compelling reasons for granting the writ have been demonstrated. Albert Einstein once observed that "[e]verything should be made as simple as possible, but not simpler." Review is needed to make the issue as simple as possible, not what is, simpler.

2. The Court Of Appeals Decision Abrogates And Conflicts With California Supreme Court Decisions On When A Purchaser Of Real Property Has Inquiry Or Constructive Notice Of Matters Affecting Title To Real Property.

Taxel claims that the BAP and Ninth Circuit decisions do not abrogate California Supreme Court decisions on inquiry or constructive notice because

the bankruptcy petition was not recorded. This is incorrect.

The inquiry notice cases cited by Chase all stand for the principle that when a prospective purchaser of real property has notice of matters or information concerning the property sufficient to put a prudent person on inquiry as to a particular fact, that person has constructive notice of the fact itself that in all cases a reasonable inquiry would have revealed. See ***Lent v. Morrill,*** 25 Cal. 492, 500, 501 (1864), ***Newhall v. Hatch,*** 134 Cal. 269, 275 (1901), ***Buehler v. Oregon-Washington Plywood Corp.,*** 17 Cal.3d 520, 529, 530 (1976) and ***Dexter v. Pierson,*** 214 Cal. 247, 250, 251 (1931). The documents in these cases that provided facts putting a prospective purchaser of real property on inquiry notice were recorded documents. However, the holding and principle of inquiry notice announced in these cases was not limited to notice gained solely from recorded documents, but notice of any circumstances sufficient to put a prudent purchaser on notice of facts requiring an inquiry. See ***Lent*** at 501, ***Newhall*** at 275, ***Buehler*** at 530, ***Dexter*** at 251; see also California Civil Code § 19.

The decisions by the BAP and the Ninth Circuit have set a contrary precedent. Both decisions concede a bankruptcy trustee has notice of the bankruptcy petition and, in turn, inquiry or constructive notice under applicable state law of facts concerning a debtor's real property at the instant the bankruptcy petition is filed, including information in the petition

itself. So far, so good in following established California precedent on this issue. But, the decisions went on to hold that the inquiry notice provided to a trustee by the petition, under California law, did not extend to or put the trustee on inquiry notice of other documents or matters described in the petition, or in pleadings required to be filed with the petition.

This part of the decisions directly conflicts with the California Supreme Court decisions, ***Lent***, ***Newhall***, ***Buehler***, and ***Dexter*** that construe the inquiry notice statute, California Civil Code § 19. These cases hold that once a prospective purchaser of real property has notice of facts (that may or may not be in a recorded document) that purchaser, under California Civil Code § 19, also has constructive notice of all matters that a proper inquiry into those facts would have revealed. See ***Lent*** at 501, ***Newhall*** at 275, ***Buehler*** at 530, ***Dexter*** at 251.[1]

The BAP and the Ninth Circuit have held otherwise, determining the bankruptcy petition did not put the trustee on inquiry notice of matters in the debtor's earlier chapter 13 bankruptcy that was required by law to be and was described in the petition. This

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[1] At least one published Ninth Circuit BAP decision, ***Wolf v. Mahrdt (In re Chenich)***, 100 B.R. 512 (9th Cir. BAP 1987), applied the holding and principle in ***Newhall***, finding that a bankruptcy trustee had inquiry notice of an extension of a due date of a promissory note, where the promissory note, and any extensions of it, were referred to in a recorded document, a deed of trust. See ***Chenich*** at 513, 514.

included information in the earlier case stating the debtor's condominium was encumbered by the Chase deed of trust, a fact contrary to the county recorder's records that showed a Chase deed of trust had been reconveyed and there were no mortgages or deeds of trust against the property. This contrary precedent was extended to disregard facts contained in bankruptcy pleadings required by F.R.B.P., Rule 1007(b) to be filed with the petition, a list of the names and addresses of creditors. One of the creditors named on this pleading was "Chase Manhattan Mortgage." The word mortgage instantly conveys the meaning of a debt secured by the debtor's real property to the hypothetical reasonably prudent purchaser, like a bankruptcy trustee. This fact also contradicts the public records, that showed there was no Chase mortgage or deed of trust, or any mortgage or deed of trust, against the property. The California Supreme Court cases hold these facts constitute inquiry and, in turn, constructive notice of the Chase deed of trust.

Contrary to Taxel's position, the BAP and Ninth Circuit decisions do abrogate California Supreme Court decisions on the extent and scope of inquiry notice of matters affecting title to real property.

3. Conclusion.

The Court of Appeals correctly described a bankruptcy trustee's hypothetical bona fide purchaser status under 11 U.S.C. § 544(a)(3) as – "[i]t is as though he were shopping for a place to live, saw a classified

ad, bought the condo after doing a title search [found no Chase deed of trust] and recorded a deed, all at the instant the petition was filed." (Appendix 13, 14.) "And now, for the rest of the story" – at that very same instant, the earlier bankruptcy case mentioned in the petition and the bankruptcy pleadings filed with the petition, the creditor's list and the schedules, revealed contrary facts to the trustee, there was a Chase deed of trust.[2] In reality, it is as though the trustee went to the condo as he was recording the deed and was told by Ms. Deuel about the deed of trust. Review by this court will ensure that in future situations involving the extent of a bankruptcy trustee's powers under section 544(a)(3) that the full story will be told.

An old Turkish proverb says that "no matter how far you have gone on the wrong road, turn back." The writ should be granted.

Dated: June 13, 2010

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[2] The late radio and television commentator Paul Harvey's famous byline.